

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1866

ROBERT MAURICE STONAKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE GEORGIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did the superior court err by not instructing the jury concerning a lesser crime than that charged in the indictment where Petitioner failed to request such an instruction and failed to object to the omission of such an instruction?

2.

Did the superior court err by not instructing the jury concerning conflicting statements of witnesses where Petitioner failed to make a timely written request for such a charge?

STATEMENT OF THE CASE

Petitioner Robert Maurice Stonaker was indicted for child molestation by a Clayton County grand jury, and he was tried in the Clayton County Superior Court on December 10-11, 1973. A jury found him guilty and sentenced him to twenty years imprisonment; however, the trial judge probated the last ten years of the sentence.

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER DID NOT MAKE A
TIMELY FILING OF HIS PETITION
FOR WRIT OF CERTIORARI.

"A petition for writ of certiorari to review the judgment of a state court of last resort [emphasis added] shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment." Rule 22(1), Revised Rules of the Supreme Court of the United States (1970). Petitioner's conviction was affirmed by the Georgia Supreme Court on January 6, 1976, and a rehearing was denied January 27, 1976. See State v. Stonaker, 236 Ga. 1, ____ S.E. 2d ____ (1976). Since this decision reversed the decision of the Georgia Court of Appeals, the Georgia Court of Appeals entered the mandate on February 17, 1976.

Petitioner attempted to present this case again to the Supreme Court of Georgia by arguing that the decision was not applicable to Petitioner's trial. The Georgia Supreme Court refused this second application for certiorari, so Petitioner moved to stay the remittitur in the Georgia Court of Appeals. Now he petitions

for writ of certiorari to this Court, and he appeals from the Georgia Court of Appeals, which is not the Georgia Court of last result.

Petitioner's 90 days began to run from January 27, 1976, the date the Georgia Supreme Court denied Petitioner's motion for rehearing. See United States v. Adams, 383 U.S. 39, 41 (1966). As Petitioner has waited approximately five months since that denial to petition for certiorari, his petition is not timely and should be denied.

B. THE PETITION FOR THE WRIT OF CERTIORARI IS NOT OF SUCH AN EXTRAORDINARY NATURE THAT IT REQUIRES THIS COURT TO ISSUE SUCH A WRIT.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and controlling reasons therefor." Rule 19, Revised Rules of the Supreme Court of the United States (1970). This Court generally grants certiorari from a state court decision under the following circumstances: (1) if the state court has decided a federal question of substance not previously determined by this Court or (2) if the state court has decided a case in a way not in accord with applicable decisions of this Court. See Rule 19, Revised Rules of the Supreme Court of the United States (1970).

Petitioner's questions for review present no substantial federal question not previously determined by this Court, and the state court decision is fully in accord with applicable decisions of this Court.

C. PETITIONER WAIVED HIS RIGHT
TO ENUMERATE AS ERROR THE
FAILURE OF THE TRIAL JUDGE
TO INSTRUCT CONCERNING
BATTERY AND CONFLICTING
STATEMENTS OF WITNESSES.

Ga. Code Ann. § 70-207(b) provides:
"In all cases, at the close of the evidence
or at such earlier time during the trial as
the court reasonably directs, any party
may present to the court written requests
that it instruct the jury on the law as
set forth therein." By not making a timely
written request for jury instructions
concerning battery and conflicting state-
ments of witnesses, Petitioner waived his
right to enumerate the omission of such
instructions as error.

Georgia's rule is practically identical
to federal law. "[O]ne complaining about
an omitted instruction must have tendered
a request and objected to its omission."
United States v. Honneus, 508 F. 2d 566,
571 (1st Cir. 1974), cert. denied, ____
U.S. ____, 95 S. Ct. 1677 (1975). Peti-
tioner alleges that he was relying on
existing Georgia law that the judge should
give instructions, absent a request,
concerning lesser included offenses. Even
if such law existed, Appellant obviously
did not rely on it. If he had relied on

the judge's giving an instruction
concerning battery, he would have objected
to the omission of such an instruction;
and Petitioner made no such objection.

Petitioner did object to the fact
that the trial judge did not instruct the
jury concerning conflicting statements
(Trial Transcript 184); however, he had
made no timely written request for such
an instruction.

Federal law is clear that certain
rights can be waived by a failure to make
a timely challenge as provided under
state law. See e.g., Francis v. Henderson,
____ U.S. ____, 19 Crim. L. Rptr. 3072
(1976); Dumont v. Estelle, 513 F. 2d 793
(5th Cir. 1975). Petitioner failed to
make timely written requests as provided
by Ga. Code Ann. § 70-207; therefore, he
has waived his right to enumerate omitted
jury instructions as error.

D. THE STATE JUDGE'S FAILURE TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES IS NOT A FEDERAL CONSTITUTIONAL QUESTION.

The Georgia Supreme Court held that simple battery is not a lesser included offense of child molestation. State v. Stonaker, supra at 2-3. One commits simple battery by either (1) intentionally making physical contact of an insulting or provoking nature with the person of another or (2) intentionally causing physical harm to another. Ga. Code Ann. § 26-1304. One commits child molestation when he does an immoral or indecent act to or in the presence of or with any child under the age of 14 with the intent to arouse or satisfy the sexual desires of either the child or the person. Ga. Code Ann. § 26-2020. Petitioner never claimed to the trial court that he was not guilty of child molestation and guilty of battery. His defense was that he was not guilty of any crime.

However, even if simple battery were a lesser included offense of child molestation, the state trial court's failure to instruct the jury on this alleged lesser included offense does not raise a federal constitutional question.

Bonner v. Henderson, 517 F. 2d 135, 136 (5th Cir. 1975); Grech v. Wainwright, 492 F. 2d 747, 748 (5th Cir. 1974); Flagler v. Wainwright, 423 F. 2d 1359, 1360 (5th Cir. 1970) cert. denied, 398 U.S. 943 (1970). Since Petitioner's enumeration presents no federal constitutional question, this Court should not grant a writ of certiorari.

E. THE STATE JUDGE'S FAILURE TO INSTRUCT ON CONFLICTING STATEMENTS OF WITNESSES, ABSENT A TIMELY WRITTEN REQUEST BY PETITIONER, IS NOT A FEDERAL CONSTITUTIONAL QUESTION.

Impeachment of a witness is a collateral matter to the fundamental role of the jury -- that of determining whether the accused is innocent or guilty. Therefore, the federal rule requires a timely written request for instructions concerning the impeachment of a witness, else the failure of the judge to give cautionary instructions is not reversible error. Rule 30, F. R. Crim. P.; Ortiz v. United States, 358 F. 2d 107, 109 (9th Cir. 1966), cert. denied, 385 U.S. 861 (1966); see Sica v. United States, 325 F. 2d 831, 836 (9th Cir. 1963), cert. denied, 376 U.S. 952 (1964).

Since Petitioner failed to make a timely written request for instructions concerning conflicting statements of witnesses, no reversible error was created by the trial court's failure to so charge, and Petitioner presents no constitutional issue to this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

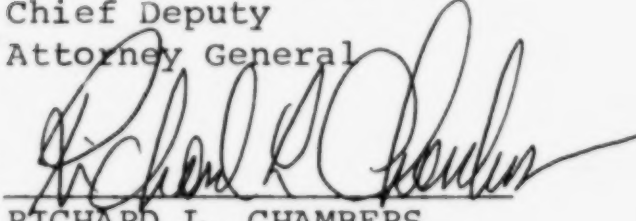
Respectfully submitted,

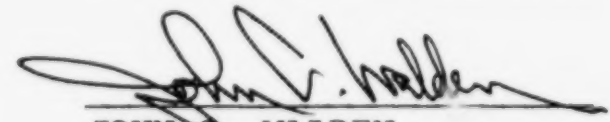
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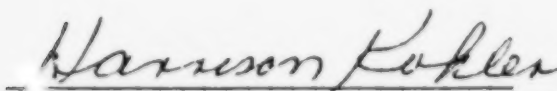
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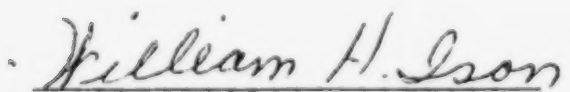
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CERTIFICATE OF SERVICE

I, Richard L. Chambers, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon the petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage to:

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This 21st day of July, 1976.



RICHARD L. CHAMBERS